Imaging and Sensing Technology Corporation *and* Howard E. DeHaven. Case 3–CA–15410

April 15, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 28, 1990, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the General Counsel filed an answering brief, cross-exceptions, and a brief in support of its cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Imaging and Sensing Technology Corporation, Horseheads, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We agree with the judge that it is unnecessary to pass on the General Counsel's separate contention that the Charging Party's comments on October 18, 1989, were a continuation of earlier protected activities.

Linda S. Harris Crovella, Esq., for the General Counsel.
James F. Young, Esq. (Sayles, Evans, Brayton, Palmer & Tifft), of Elmira, New York, for the Respondent.
Sandra J. Garvey, Esq. (Twining, Nemia, Hill & Steflik), of Binghampton, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Imaging and Sensing Technology Corporation (Respondent) committed an unfair labor practice within the meaning of Section 8(a)(1) of the National Labor Relations Act (Act) by having discharged Howard E. DeHaven from its employ because of remarks he made which were protected by Section 7 of the Act. Respondent's answer avers that those remarks, in context, were unprotected.

I heard this case on May 16, 1990, in Painted Post, New York. On the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the respective counsel named above, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation engaged in the manufacture of electronic products. In its operations annually, it meets the Board's nonretail standard for asserting jurisdiction.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Background*

As discussed further below, Respondent is owned by four individuals who had been executives of Westinghouse Electrical Corporation at its plant in Horseheads, New York, prior to their buying the facility in 1988 for Respondent from Westinghouse.

Howard DeHaven had been employed by Westinghouse for about 32 years at that facility. He was working as an engineering specialist for Westinghouse at the time of Respondent's takeover; he was hired in that same capacity by Respondent in mid-1988.

B. *The Alleged Discrimination*

1. The evidence

On October 18, 1989, Respondent was holding one of its regular monthly meetings of its salaried employees. Each of its four owners discussed the status of the respective area of operations for which he was responsible. One of them, Respondent's president Roy Kyles, commented during his presentation, that he had talked to a manager under him about low productivities of employees and that that manager had stated, ''Well, no wonder. They're not being paid.'' Kyles went on to say that he told that manager then that he did not believe that pay was the problem.

When the owners completed their respective presentations, they asked for any questions or comments, as they usually had done. DeHaven stood up and said he disagreed with Kyle's comment and that his (DeHaven's) personal opinion was that the more a person is paid, the harder he will want to work. DeHaven went on to say that ''that was [his] report card. What was in [his] paycheck twice a month was what [his] value was to [the] owners.'' In response, Kyles said simply,''So noted.'' Shortly afterwards, the meeting ended. DeHaven went to the laboratory when he worked to put away his equipment as it was about closing time for the day. Meanwhile, the four managers reviewed with Respondent's manager of human resources, Julie McMullen, the remarks just made by DeHaven and the fact that he made other comments at a meeting in the spring of 1988, discussed further below. They discussed the impact of DeHaven's comments at the October 18, 1989 meeting on its employees and concluded that they could not tolerate such an attitude because it encouraged other employees not to perform their work and as it affected the quality of work life for everyone. They concluded that DeHaven should be discharged.

DeHaven, who was about to leave the plant, was instead summoned to his manager's office and was told there by McMullen that he was discharged.

2. Analysis

The evidence is that DeHaven, at a meeting of employees called by Respondent's owner on October 18, 1989, contested the assertion by one of them that what employees are paid is not the cause of low work productivity; DeHaven instead had offered the view that there is a definite nexus between the two. The evidence is clear, too, that Respondent discharged DeHaven because it feared the impact of DeHaven's remarks on his coworkers.

The General Counsel has established a clear prima facie case. See *Whittaker Corp*., 289 NLRB 933 (1988), where the Board undertook a detailed analysis of a closely analogous fact situation and found similar remarks by an employee at a meeting called by the employer there to be protected and the discharge of the employee there to be unlawful.

Respondent argues that *Whittaker* is, in effect, distinguishable based on the assertion in its brief that Respondent believed DeHaven ''was speaking as an individual'' and that he ''was registering a personal complaint.'' Suffice it to note that that was not the basis of Respondent's decision to discharge DeHaven; it was concerned with the effect that DeHaven's remarks might have on the other employees. More precisely, it was concerned that DeHaven's statements implicitly elicited support from his fellow employees as to the amounts they were paid for their work, the core of the Board's holding in *Whittaker* as to the protected nature of the remarks. In that regard, see also *Brownsville Garment Co*., 298 NLRB 507 (1990); *Enterprise Products*, 264 NLRB 946 (1982).

Under *Wright Line*, 251 NLRB 1083 (1980), the burden thus has shifted to Respondent to demonstrate that it would have discharged DeHaven absent his having engaged in protected activities. Respondent presented a contention, separate from the one discussed above. That alternate contention is not posited as a *Wright Line* defense but that is not a basis for disregarding it. Respondent asserts, that DeHaven's remarks were, in effect, an outgrowth of unprotected remarks he made about 18 months previously. As to that contention, General Counsel's view is that DeHaven's comments on the day of his discharge were a continuation of other aspects of employee protected activities. To put those arguments in context, the following background is set out.

As briefly noted above, Respondent in mid-1988, purchased *Westinghouse Electric Corporation*, the facility involved in this case. Prior to the takeover on May 1, 1988, and after, Respondent's owners met with groups of employees at the facility. At one of those meetings,[1] one of the owners expanded on a notice that Respondent would pay the employees less than they received from Westinghouse. DeHaven then asked him, ''if he honestly thought that [DeHaven] would do the same work for him as [DeHaven] did for Westinghouse for 11 percent less money?''

DeHaven began working for Respondent on May 1, 1988. He received a merit wage increase in May 1989 and an above average job performance appraisal.

The General Counsel adduced evidence that a number of Westinghouse personnel, including employees, had formed the Concerned Employees Association (CEA) which sued Westinghouse and the four owners of Respondent, claiming age discrimination. CEA also has held meetings at which employees expressed their unhappiness with being downgraded in pay. There is no evidence that DeHaven was active in CEA.

Respondent has failed to meet its *Wright Line* burden. Inextricably tied to its reference to DeHaven's remarks in 1988 that he would not work as hard for Respondent as he did for Westinghouse is the evidence that the protected remarks DeHaven made on October 18, 1989, were the very ones, according to Respondent's evidence, that reactivated its consideration of DeHaven's 1988 statements. In other words, Respondent has not shown that, *absent* his protected activities, it would have still discharged DeHaven. Moreover, it is likely that its owners, in deciding to discharge DeHaven, made but passing reference to DeHaven's comments in 1988 as, since 1988, it had given him a merit raise and an above average appraisal.[2]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act by having discharged Howard E. DeHaven from its employ because of his comments at an employee meeting on October 18, 1989, which were protected by Section 7 of the Act.

3. This unfair labor practice affects commerce within the meaning of Section (6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, Respondent shall cease and desist and take certain affirmative action designed to effectuate the policies of the Act. It shall offer Howard E. DeHaven immediate and full reinstatement to his former job, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall also remove any reference to the discharge from its files. *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Imaging and Sensing Technology Corporation, Horseheads, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for making statements which impliedly enlist support from employees towards im-

[1] DeHaven recalls it was at a meeting on April 18, 1988, that is, prior to the takeover. Respondent's witnesses put the time of the meeting discussed here as having occurred sometime in May 1988. It is unnecessary to decide the exact date.

[2] It is unnecessary to make a finding as to General Counsel's separate contention that DeHaven's comments on October 18, 1989, were protected on a further basis—as a continuation of the protected activities of the employees who, under the CEA umbrella, discussed the reduced wages Respondent paid, compared to those Westinghouse had paid.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

proving wages, terms, or other conditions of their employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Howard E. DeHaven immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharge and notify DeHaven in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Horseheads, New York, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge any employee for making statements which impliedly enlist support from employees towards improving wages, hours of work, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Howard E. DeHaven immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

IMAGING AND SENSING TECHNOLOGY CORPORATION